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DATO' TAN HENG CHEW

v.

TAN KIM HOR & ANOTHER APPEAL

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FEDERAL COURT, PUTRAJAYA
SITI NORMA YAAKOB CJ (MALAYA)
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL HAMID MOHAMAD FCJ
[CIVIL APPEAL NOS: 02-6-2005(W) & 02-8-2005(W)]
4 JANUARY 2006

C

CIVIL PROCEDURE: *Judicial precedent - Stare decisis - Whether Court of Appeal may disagree with judgements of Federal Court*

CIVIL PROCEDURE: *Judge - Judge to recuse himself - Whether "real danger of bias" needs to be shown - Whether test is objective or subjective in nature*

D

As a result of a family feud between the respondent's family and the appellant's family, the respondent filed a petition to wind-up Tan Chong Consolidated Sdn. Bhd. on just and equitable grounds. The appellant's family filed an application to strike out the petition. The learned High Court judge struck out the petition. In granting the order, the learned judge in her judgement made several findings regarding the respondent. While the winding-up proceedings were going on, the respondent filed this suit claiming, *inter alia*, certain declarations that his non-appointment as director of the 1st to 4th defendants was wrongful and unjustified. There was also a pending contempt proceeding against the respondent in this action. The respondent then filed a summons seeking the recusal of the learned judge.

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The learned judge dismissed the application for her recusal but her order was reversed by the Court of Appeal. The Federal Court granted the appellants leave to appeal on the following question of law: "Whether the new test for recusal formulated by the Court of Appeal in these words: "would a right thinking member of the public armed with the facts before us come to the conclusion that the appellant would receive justice at the end of the trial before the same judge?" is the correct test, given that it is totally inconsistent with the "real danger of bias" test formulated by the Federal Court and the Court of Appeal in various cases including *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* and *Mohd Ezam Mohd. Nor & Ors v. Ketua Polis Negara*."

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I

The learned judge had examined the real suspicion of bias test the real likelihood of bias test and the real danger of bias test and had concluded that the correct test to be applied in this case was the "real danger of bias" test, as approved by the Federal Court in *Ezam*'s case. The Court of Appeal was of the view that the learned judge had asked herself the wrong question when she applied the "real danger of bias" test.

Held (dismissing the appeals)
Per Steve Shim CJ (Sabah & Sarawak):

(1) The Court of Appeal is bound by the doctrine of *stare decisis* to follow the "real danger of bias" test for recusal adopted by the Federal Court in *Majlis Perbandaran Pulau Pinang (supra)* and *Mohamed Ezam Mohd Nor (supra)*. The doctrine of *stare decisis* has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability. (para 2)

(2) Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system. (para 3)

Per Abdul Hamid Mohamad FCJ

(1) The judgements in *Majlis Perbandaran Pulau Pinang (supra)*, *Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd and Another Application*, and *Mohd Ezam Mohd. Nor (supra)* being judgments of the Federal Court, are binding on the Court of Appeal. Whether the Court of Appeal agrees with them or not, it is incumbent upon it to apply the test. However, if the court thinks that it has good reasons for disagreeing with the judgments, it may, while following them, point out why they should be reviewed by the Federal Court. But the review, if it were to be done, should be done by the Federal Court. Until it is actually done by the Federal Court, they remain binding on the Court of Appeal. So, the Court of Appeal was wrong in not applying the "real danger of bias" test. (para 20)

(2) The "old test" would not lead to an injustice nor would "the new" test lead to more justice. What is more important is the integrity and honesty of the judges themselves. (para 22)

(3) The doctrine of *stare decisis* requires the Court of Appeal to follow the "real danger of bias" test adopted by the Federal Court in *Majlis Perbandaran Pulau Pinang (supra)* and *Mohamed Ezam Mohd. Nor (supra)*. There is no reason why the test should be changed or modified. The learned judge had not committed an error in applying the "real danger of bias" test. (paras 23 & 24)

(4) The learned judge said she would not be biased. But, viewed objectively, the question was whether, in the circumstances of the case, there was a real danger of bias on her part, even though unintentionally. The Court of Appeal and the Federal Court were in a better position to assess since the Court of Appeal and the Federal Court were not directly involved in it. So, if on the facts and in the circumstances of the case, the Federal Court found that there was a real danger of bias, even though the trial judge felt that she was not inclined to, in the interest of justice, she should be advised to recuse herself. (para 25)

(5) Considering all the circumstances of the case, objectively viewed, there was a real danger of bias on the part of the learned judge if she were to continue to try the suit. In this situation, if the court were to err, it would be better to err on the side of recusal in order to maintain the highest standard of public confidence in the judiciary. But, each case is to be decided on its own facts and the court should be vigilant not to allow parties to do "judge-shopping" by recusal of judges. So, even though the Court of Appeal was wrong in not applying the "real danger of bias" test, applying the same test to the facts of this case, the conclusion was the same as that of the Court of Appeal. (paras 31 & 32)

Bahasa Malaysia *translation of headnotes*

Ekoran pertelingkahan keluarga yang berlaku di antara keluarga responden dan keluarga perayu, responden memfailkan petisyen bagi menggulung Tan Chong Consolidated Sdn Bhd atas alasan berbuat demikian adalah munasabah dan adil. Keluarga perayu memfail permohonan untuk mengenepikan petisyen dan petisyen diketepikan oleh yang arif hakim Mahkamah Tinggi. Dalam memberikan perintah, yang arif hakim, dalam penghakimannya, membuat beberapa dapatan mengenai responden. Sementara itu, ketika prosiding penggulungan di sini masih berjalan, responden memfail tuntutan semasa antara lain bagi menuntut pengisytiharan

bahawa kegagalan melantik dirinya sebagai pengarah defendan-defendan pertama hingga keempat adalah tidak wajar dan salah. Selain itu, terdapat juga suatu prosiding menghina mahkamah terhadap responden di dalam guaman ini. Berikutnya responden memfail saman bagi penarikan diri yang arif hakim.

Yang arif hakim menolak permohonan untuk penarikan dirinya, tetapi perintah tersebut telah diakas oleh Mahkamah Rayuan. Mahkamah Persekutuan membenarkan perayu merayu atas persoalan undang-undang berikut, iaitu: "sama ada ujian baru penarikan diri yang dipakai oleh Mahkamah Rayuan yang digubal dengan kata-kata berikut, iaitu: "adakah seorang ahli masyarakat yang berfikiran waras, berdepan dengan fakta yang wujud, akan mencapai rumusan bahawa perayu akan mendapat keadilan di akhir perbicaraan di hadapan hakim yang sama?" merupakan ujian yang betul, memandangkan bahawa ia adalah tidak konsisten dengan ujian "real danger of bias" seperti yang digubal oleh Mahkamah Persekutuan dan Mahkamah Rayuan dalam kes-kes seperti *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* dan *Mohd Ezam Mohd. Nor v. Ketua Polis Negara*."

Yang arif hakim telah meneliti ujian-ujian "real suspicion of bias", "real likelihood of bias" dan "real danger of bias" dan merumuskan bahawa ujian yang betul untuk dipakai adalah ujian "real danger of bias" sepertimana ianya digunapakai oleh Mahkamah Persekutuan di dalam kes *Ezam (supra)*. Mahkamah Rayuan berpendapat bahawa yang arif hakim telah bertanyakan dirinya soalan yang salah apabila beliau memakai ujian "real danger of bias".

Diputuskan (menolak rayuan-rayuan tersebut)
Oleh Steve Shim KH (Sabah & Sarawak):

(1) Mahkamah Rayuan terikat dengan doktrin *stare decisis* dan harus menuruti ujian "real danger of bias" bagi kes-kes pengunduran diri seperti yang diputuskan oleh Mahkamah Persekutuan di dalam *Majlis Perbandaran Pulau Pinang (supra)* dan *Mohamed Ezam Mohd Nor (supra)*. Doktrin *stare decisis* telah menjadi batu penjuru bagi sistem common law yang digunapakai di negara ini. Ia teramat penting bagi kewujudannya serta kewujudan rule of law. Ia malah telah mencapai status tidak boleh ditukar ganti.

A **(2)** Hirarki kehakiman harus dihormati demi memastikan kemuktamadan dan ketentuan undang-undang dan bagi mencapai perkembangan kaedah-kaedah perundangan yang tersusun serta memudahkan penyeliaan urusan oleh mahkamah dan peguam-peguam. Kegagalan menghormati teladan duluan
B akan menyebabkan sistem kehakiman menjadi kucar kacir dan tidak menentu.

Oleh Abdul Hamid Mohamad HMP:

C **(1)** Keputusan dalam *Majlis Perbandaran Pulau Pinang (supra)*, *Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd and Another Application*, dan *Mohd Ezam bin Mohd. Nor (supra)*, sebagai keputusan Mahkamah Persekutuan, adalah mengikat Mahkamah Rayuan. Sama ada Mahkamah Rayuan bersetuju
D dengannya ataupun tidak, ia wajib menggunapakai ujian tersebut. Bagaimanapun, jika mahkamah itu merasakan wujud alasan-alasan kukuh untuk tidak bersetuju dengan penghakiman berkenaan, ia boleh, dalam pada menuruti penghakiman tersebut, menyatakan mengapa ianya patut disemak oleh
E Mahkamah Persekutuan. Apapun, semakan, jikapun dibuat, hanya boleh dibuat oleh Mahkamah Persekututan. Sebelum semakan sedemikian dibuat, ia mengikat Mahkamah Rayuan. Oleh itu, Mahkamah Rayuan khilaf apabila tidak memakai ujian "real danger of bias".

F **(2)** Ujian "yang lama" tidak akan membawa kepada ketidakadilan dan begitu juga ujian "yang baru" tidak akan membawa kepada keadilan yang lebih mantap. Yang penting adalah integriti dan kejujuran hakim-hakim itu sendiri.

G **(3)** Doktrin *stare decisis* mengkehendaki Mahkamah Rayuan supaya mengikuti ujian "real danger of bias" seperti yang diterimapakai oleh Mahkamah Persekutuan di dalam *Majlis Perbandaran Pulau Pinang (supra)* dan *Mohamed Ezam Mohd. Nor (supra)*. Tidak ada sebab mengapa ujian tersebut harus ditukar atau
H diubahsuai. Yang arif hakim tidak melakukan sebarang kekhilafan apabila menggunapakai ujian "real danger of bias".

(4) Yang arif hakim menyatakan bahawa beliau tidak akan bersikap berat sebelah. Tetapi, dipandang secara objektif, persoalannya
I adalah sama ada, dalam halkeadaan kes, terdapat "real danger of bias" pada dirinya, walaupun tanpa disengajakan. Mahkamah Rayuan dan Mahkamah Persekutuan berada dalam kedudukan yang lebih baik untuk menilai kerana mahkamah-

mahkamah tersebut tidak terlibat secara langsung dengannya. Oleh itu, sekiranya berdasarkan fakta dan keadaan kes, Mahkamah Persekutuan berpendapat bahawa wujud "real danger of bias", hakim bicara, walaupun merasa bahawa beliau tidak cenderung ke arah itu, harus mengundurkan diri atas nama keadilan.

(5) Mengambilkira semua halkeadaan kes, dan dipandang secara objektif, terdapat "real danger of bias" di pihak yang arif hakim sekiranya beliau meneruskan dengan perbicaraan guaman. Dalam kes ini, sekiranyapun mahkamah harus membuat khilaf, adalah lebih baik jika ia terkhilaf di pihak penarikan diri demi menjaga dan mempastikan bahawa keyakinan mantap masyarakat terhadap institusi kehakiman tidak tergugat. Walau bagaimanapun, setiap kes hendaklah diputuskan mengikut faktanya sendiri dan mahkamah harus sentiasa berhati-hati agar tidak mendorong pihak-pihak terlibat dalam "urusan beli-belah hakim" melalui pengunduran diri hakim-hakim. Jadi, walaupun Mahkamah Rayuan khilaf kerana tidak menggunapakai ujian "real danger of bias", dengan melaksanakan ujian yang sama kepada kes di sini, keputusannya masih tetap sama seperti yang diputuskan oleh Mahkamah Rayuan.

Case(s) referred to:

Alkaff v. Governor-in-Council & Ors [1932] MLJ Rep 202 ***(refd)***
Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Another Application [2001] 2 CLJ 253 FC ***(refd)***
Cocabail (UK) Ltd v. Bayfield Properties Ltd [2000] 1 WLR 870 ***(refd)***
Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***
Periasamy Sinnapan & Anor v. PP [1996] 2 MLJ 557 ***(refd)***
Porter & Anor v. Magill [2002] 1 All ER 465 ***(refd)***
PP v. Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 277 ***(refd)***
PP v. Lau Tuck Weng [1988] 3 MLJ 217 ***(refd)***
R v. Gough [1993] All ER 724 ***(refd)***
Webb v. The Queen [1994] 68 ALJR 582 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19

(Civil Appeal No: 02-6-2005(W))
For the appellant - Lim Kian Leong (Sia Siew Mun, Wong Yoke Peng, Tan Shin Shin & Rohana Ngah with him); M/s Lim Kian Leong & Co
For the respondent - Cecil Abraham (Shafee Abdullah, Yee Mei Ken & Sunil Abraham with him); M/s Shearn Delamore & Co

(Civil Appeal No: 02-8-2005(W))
For the appellants - Wong Chong Waah (Wong Chee Lin with him); M/s Skrine & Co
For the respondent - Cecil Abraham (Shafee Abdullah, Yee Mei Ken & Sunil Abraham with him); M/s Shearn Delamore & Co

Reported by Amutha Suppayah

JUDGMENT

Siti Norma Yaakob CJ (Malaya):

[1] I associate myself with the reasonings and findings of my brother judges, Abdul Hamid Mohamad, FCJ and Steve Shim Lip Kiong, CJSS, and concur that both the appeals be dismissed with half costs to be taxed and be paid by the appellant and the deposits be paid out to the respondent to account of his taxed costs in both appeals.

Steve Shim CJ (Sabah & Sarawak):

[2] I agree that for the reasons stated by my noble and learned brother Abdul Hamid Mohamad FCJ, the appeal should be dismissed with half costs to the respondents. I may add that I agree entirely with his Lordship's observation that the Court of Appeal is bound by the doctrine of stare decisis to follow the "real danger of bias" test for recusal adopted by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Sykt. Berkerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 CLJ 65 and *Mohamed Ezam bin Mohd Nor & 4 Ors v. Ketua Polis Negara* [2001] 4 CLJ 701. It is axiomatic to state that the doctrine of *stare decisis* has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability. In *Public Prosecutor v. Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 277, Mr. Justice Chang Min Tat had occasion to restate the doctrine in words which are poignantly clear when he said:

> It is … necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours to follow similarly.

[3] Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system. This fact was certainly borne in mind by the Court of Appeal in *Periasamy s/o Sinnapan & Anor v. Public Prosecutor* [1996] 2 MLJ 557 wherein Gopal Sri Ram JCA said:

> We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this Court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

[4] The observation is but a stark reminder to judges of the importance of adhering to the doctrine. That observation, although made in the context of a peculiar factual setting, is, in my view, equally applicable to the particular situation in the instant case where the Court of Appeal has refused, for insufficient reasons, to follow and apply the "real danger of bias" test for recusal enunciated by the Federal Court in *Majlis Perbandaran Pulau Pinang (supra)* and *Mohamed Ezam (supra)*. Until such time when the Federal Court holds otherwise, this test must remain entrenched and binding on all inferior courts including the Court of Appeal. Certainty in the law must prevail.

Abdul Hamid Mohamad FCJ:

[5] There are two appeals before us arising from an application by the respondent for the learned High Court Judge to recuse herself from hearing Civil Suit No. D2-22-1179-2002. She dismissed the application but her order was reversed by the Court of Appeal on 12 January 2005.

[6] This court, on 17 May 2005, granted the appellants leave to appeal to this court on the following question of law:

A Whether the new test for recusal formulated by the Court of Appeal in these words:

> would a right thinking member of the public armed with the facts before us come to the conclusion that the appellant would receive justice at the end of the trail before the same judge?

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is the correct test, given that it is totally inconsistent with the "real danger of bias" test formulated by the Federal Court and the Court of Appeal in various cases including *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 and *Mohd Ezam bin Mohd. Nor v. Ketua Polis Negara* [2001] 4 CLJ 701.

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[7] In her judgment, the learned judge examined the following tests:

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(a) the real suspicion of bias test;

(b) the real likelihood of bias test; and

(c) the real danger of bias test.

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[8] She referred to *R v. Gough* [1993] All ER 724 (HL) but also noted, citing *Cocabail (U.K.) Ltd. v. Bayfield Properties Ltd.* [2000] 1 WLR 870 (CA) as the source, that *R v. Gough (supra)* "was not accepted in Australia, South Africa, Scotland and the European Court of Human Rights, which continued to apply the "reasonable suspicion" or "reasonable apprehension" tests".

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[9] Regarding the position in Malaysia, this is what she said:

> Although Malaysian judicial opinion seems to be at variance on this point, it might be noted that the Federal Court in both *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65, and *Mohd. Ezam bin Mohd Nor & 4 Yang Lain (unreported) v. Ketua Polis Negara,* followed *R v. Gough* applied the 'real danger of bias' test; whereas cases such as *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900 and *Alkaff v. Governor-in-Council & Ors* [1932] MLJ Rep. 202 & *Public Prosecutor v. Lau Tuck Weng* [1988] 3 MLJ 217, preferred the "real suspicion of bias" test".

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[10] It should be noted that the *Majlis Perbandaran Pulau Pinang* case *(supra)* and *Mohamed Ezam bin Mohd. Nor (supra)* since reported at [2001] 4 CLJ 701 referred to by the learned judge, are both judgments of this court. On the other hand, *Alkaff*'s case

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(which is also reported in [1937] 6 MLJ (SSR) 211) is a judgment of the Court of Appeal of the Straits Settlement. *Public Prosecutor v. Lau Tuck Weng (supra)* is a judgment of the High Court whilst *Hock Hua Bank (Sabah) Bhd. (supra)* is another judgment of the Court of Appeal.

[11] She then concluded that "… having regard to the authorities cited by both parties in this application, it is my view that the correct test to be applied in this case is the 'real danger of bias' test, as approved by the Federal Court in *Ezam*'s case, following the *Gough* principle."

[12] The Court of Appeal in the instant appeal, in an "oral judgment", was of the view "that the learned judge (had) asked herself the wrong question" when she applied the "real danger of bias" test. Then, referring to the argument of the learned counsel for the appellant that, had the learned judge applied the "real suspicion of bias" test, then the judgment may have been open to criticism, retorted:

> With great respect, we find counsel's arguments bordering on the pedantic. On the facts of this case, it does not matter which test is applied. The result would be the same.

[13] Then, going back to the test, the judgment went on to say:

> We are aware that the test for determining whether a judicial arbiter should recuse himself or herself has been stated in different terms, in different cases and in different authorities. But we think it is safe in the context of the present circumstances to put the test this way: Would a right thinking member of the public armed with the facts before us come to the conclusion that the appellant would receive justice at the end of the trial before the same judge? We have turned this question over in our minds several times. We are convinced that it must receive a negative response. That being the case, the learned judge quite obviously asked herself the wrong question when she came to the conclusion that she would not recuse herself.

[14] So, as I understand the judgment of the Court of Appeal, first it says that the learned judge had asked herself the wrong question which, in the context, would mean that she had applied the wrong test. Then, it went on to say that it did not matter what test she applied because on the facts, the conclusion would have been the same: ie, she should have recused herself. Then it laid down the new test and then again said that the learned judge had asked herself the wrong question.

[15] Learned counsel for the respondent did not take the stand that the test formulated by the Court of Appeal is the correct test that should be applied in place of the "real danger of bias" test. Instead, he insisted that the Court of Appeal did apply the "real danger of bias" test. In his written submission in this court he said, "Both parties in their written submission (in the Court of Appeal – added) as well as in the course of the arguments have confirmed that the applicable test is the "real danger of bias" test".

[16] But, from the judgment of the Court of Appeal, it is very clear that the court did not approve the High Court Judge using the "real danger of bias" test. Twice in the judgment it was said that the learned judge had asked herself the wrong question. Furthermore, a new test was formulated.

[17] Let us look at the judgments of this court on the issue. First, the *Majlis Perbandaran Pulau Pinang*'s case *(supra)* where this court discussed the issue at great length, referring to numerous authorities and concluded that "the real danger of bias" test given in *R v. Gough (supra)* was to be preferred.

[18] The same case was referred to in the judgment of this court in *Allied Capital Sdn. Bhd. v. Mohamed Latiff bin Shah Mohd and Another Application* [2001] 2 CLJ 253. In fact that part of the judgment in *Majlis Perbandaran Pulau Pinang (supra)* that contains the statement that the court preferred the "real danger of bias" test was reproduced. However, the judgment in *Allied Capital Sdn Bhd. (supra)* did not say in so many words that the court adopted that test. My reading of the judgment is that the passage was quoted with approval.

[19] Then comes the case of *Mohamed Ezam bin Mohd. Nor (supra)*. The apppeal was heard by a 5-member panel which delivered a single unanimous judgement. It should be noted that in that case, learned counsel for the appellant relied on *Webb v. The Queen* [1994] 68 ALJR 582, in urging the court to adopt "the reasonable apprehension or suspicion" test. The court categorically ruled:

> Having considered the authorities cited and their reasonings, we would follow Gough which is that the test to be applied in the present case is the 'real danger of bias' test. Hence, the question here is whether having regard to the facts and circumstances, was there a real danger of bias on the part of the learned trial judge when he heard the *habeas corpus* application involving the appellants?

[20] These judgments, being judgments of the Federal Court, are binding on the Court of Apppeal. Whether the Court of Appeal agrees with them or not, it is incumbent upon it to apply the test. However, if the court thinks that it has good reasons for disagreeing with the judgments, it may, while following them, point out why they should be reviewed by this court. But the review, if it were to be done, should be done by this court. Until it is actually done by this court, they remain binding on the Court of Appeal. So, the Court of Appeal was wrong in not applying the "real danger of bias" test.

[21] Since the matter is now before this court, I shall consider whether there is a need to change the "real danger of bias" test. The Court of Appeal itself did not give any reason for adopting a new test.

[22] It has been brought to our attention that, in England, the *R v. Gough (supra)* test has been modified by the House of Lords in *Porter and Another v. Magill* [2002] 1 All ER 465. With the modification, the "question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." This modification was made to bring it more closely with Strasbourg jurisprudence which, since 2 October 2000 the English courts were required to take into account. The House of Lords had a reason for modifying the test. But, that reason is not relevant in Malaysia. I do not think that the "old test" would lead to an injustice or that "the new" test would lead to more justice. What is more important is the integrity and honesty of the judges themselves.

[23] To answer the question posed, I would say that the doctrine of *stare decisis* requires the Court of Appeal to follow the "real danger of bias" test adopted by this court in *Majlis Perbandaran Pulau Pinang (supra)* and *Mohamed Ezam bin Mohd. Nor (supra)*. Furthermore, I see no reason why the test should be changed or modified.

[24] What then is the effect on the appeal?

From the "oral judgment", it appears to me that the main reason why the Court of Appeal reversed the judgment of the High Court was because the learned High Court Judge had "asked herself the wrong question", even though it did say that it did not matter what test was applied, on the facts, the result would have been

A the same ie, the learned judge should have recused herself. Now that I have said that the learned High Court Judge had not committed an error in applying the "real danger of bias" test, the question is whether, applying that test, she should have recused herself.

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[25] The learned High Court Judge said she would not be biased. It may be so. But, viewed objectively, the question is whether, in the circumstances of the case, there is a real danger of bias on her part, even though unintentionally. In this respect, I think that C the Court of Appeal and this court are in a better position to assess since the Court of Appeal and this court are not directly involved in it. So, if on the facts and in the circumstances of the case, this court finds that there is a real danger of bias, even though the trial judge feels that she is not inclined to, I think that D in the interest of justice, she should be advised to recuse herself.

[26] Let us now look at the facts of this case. There is a family feud between the respondent's family and the appellant's family. As a result, the respondent filed a petition to wind-up Tan Chong E Consolidated Sdn. Bhd. ("TCC") on the just and equitable ground. The appellant's family filed an application to strike out the petition. The learned High Court Judge struck out the petition. In granting the order, the learned judge made the following findings in her judgment regarding the respondent:

F (a) that the Plaintiff had threatened to derail the de-merger exercise if the 1st to 8th Respondents named in the Winding Up petition did not agree to wind-up Tan Chong Consolidated Sdn. Bhd. ("TCC");

G (b) that the Plaintiff had harboured feelings of disquiet against the 1st Respondent named in the Winding Up petition, ie, the 6th Defendant herein which had fermented into what appeared to be intense pique;

(c) that the Plaintiff's complaints were motivated not by his H desire to redress wrongs committed against *inter alia* the Plaintiff but instead for a collateral purpose;

(d) that the Plaintiff's complaints stemmed from the slights (imagined or otherwise) from a brash, younger man, namely the 6th Defendant herein;

I (e) that the Plaintiff's feelings of disquiet were largely motivated by self-interest and self-preservation and not because there existed a real breakdown of trust and understanding;

(f) that all the agitations were excited almost entirely because the Plaintiff had already harboured an intention to wind-up TCC;

(g) that the only complaints of the Plaintiff against the 6th Defendant herein before the EGM on 11.9.1999 were the decisions made on Nissan JV in China, Subaru JV in China, buying office space in Hong Kong and increasing his and the 2nd Respondent named in the Winding Up Petition salaries, without consulting him;

(h) that there was no evidence to show that the 6th Defendant herein had exceeded his powers for some illegitimate or ulterior purpose;

(i) that the Plaintiff suffered from a bad case of petulance and peevishness which let to mulish resistance to agree to sign the circular resolution approving the de-merger;

(j) that the Plaintiff had acted unreasonably;

(k) that the Plaintiff had conducted himself in a wanton and unreasonable manner, and that the Plaintiff's conduct was in careless disregard of the interests of the other shareholders in the listed company;

(l) that the Plaintiff was prepared to put his own selfish interest to wind-up TCC ahead of the interests of the TCMH Group and all its public shareholders as well as the interest of TCC and its shareholders as a whole;

(m) that the Plaintiffs complaints after the 11th September EGM were largely against the conduct of the 6th Defendant named herein *viz-a-viz* his position in TCC which mostly concerned management issues relating to the 4 public listed companies and should be dealt with at the public listed companies' management level, and that such allegations were in any event irrelevant to justify reasons to wind-up TCC.

(n) that the Plaintiff had a collateral purpose and bad faith in filing the petition;

(o) that the Plaintiff seemed determined at all cost to wind up TCC to the extent where they had failed to disclose facts to the Court;

A (p) that the Plaintiff could not justify that he was oppressed and denied participation in the affairs of TCC when the petitioners and several of their family members were actively involved in the management of TCC and companies within the Tan Chong Group of Companies;

B (q) that what the Plaintiff found galling was to be outvoted on most counts;

(r) that the only thorn in the flesh of the plaintiff was that the Respondents named in the Winding Up Petition were in effective control by virtue of their collective shareholding, C while the Petitioners were not;

(s) that the Plaintiff's maudlin pre-occupation with tradition and remembrance of things past got in the way of the practical, pragmatic corporate governance of the day; and

D (t) that the Plaintiff had well and truly put paid to his expectation that equitable considerations would continue to bind the parties.

(Note that "the Plaintiff" is the respondent in the instant appeal)

E **[27]** These findings, it must be remembered, were made in an application to strike out the winding up petition under O. 18 r. 19 of the Rules of the High Court 1980 ("RHC1980"). Such specific findings of facts should not have been made in such an F application in the first place and that was the reason why the Court of Appeal reversed her decision and directed that the petition be heard by another judge (see *Tan Kim Hor & Ors. v. Tan Heng Chew & Ors.* [2003] 1 MLJ 492).

[28] While the winding up proceedings were going on, the G respondent filed this suit claiming, inter alia, certain declarations that his non-appointment as director of the 1st to 4th defendants in the writ action (1st to 4th appellants in the other appeal, 02-8-2005(W)) was wrongful and unjustified. The respondent then filed a summons seeking the recusal order in issue.

H **[29]** It should be noted that when the learned judge decided the recusal application, the Court of Appeal had not given its decision in the respondent's appeal to the Court of Appeal against the order of the learned judge striking of the winding up petition. So, I it is not quite right for the Court of Apppeal in the instant appeal to say that "No clearer signal could have been sent to the learned judge" to recuse herself.

[30] Another point that should be noted is that there is a pending contempt proceeding against the respondent in this action. The Court of Appeal considered this as "a point of importance" in deciding that the learned judge should have recused herself.

[31] So, considering all the circumstances of the case, objectively viewed, is there a real danger of bias on the part of the learned judge if she were to continue to try the suit? While she feels she may not be, my answer is in the affirmative. In this situation, if I were to err, I would prefer to err on the side of recusal. I am being cautious in order to maintain the highest standard of public confidence in the judiciary. But, I would like to add that each case is to be decided on its own facts and the court should be vigilant not to allow parties to do "judge-shopping" by recusal of judges.

[32] So, even though it is my judgment that the Court of Appeal was wrong in not applying the "real danger of bias" test, applying the same test to the facts of this case, my conclusion is the same as that of the Court of Appeal. I would therefore dismiss the apppeal in 02-6-2005(W). Regarding costs, as it was the Court of Apppeal that had necessitated the granting of leave in this appeal, I would order that the appellant pays half the costs of this appeal to the respondent which shall be taxed by the registrar. I would also order that the deposit be paid to the respondent on account of the taxed costs.

[33] For the same reasons, I would also dismiss the other appeal (02-8-2005(W)) and make similar orders.